MOTION FILED
MAR 2 1998

Nos. 98-1026; 98-1028; 98-1039; & 98-1052

In the

Supreme Court of the United States

October Term, 1998

STATE OF WASHINGTON,
Petitioners,

v.

UNITED STATES OF AMERICA, et al.,
Respondents.

(Additional parties listed on inside front cover.)

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, 26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS, PUGET SOUND SHELLFISH GROWERS, LARRY B. AND SHIRLEE ALEXANDER, AND WILLIAM AND CHARMOND ADKINS

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PUGET SOUND SHELLFISH GROWERS,

Petitioners,

v.

UNITED STATES OF AMERICA, et al.,

Respondents.

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26 TIDELAND AND UPLAND
PRIVATE PROPERTY OWNERS,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents

LARRY B. AND SHIRLEE ALEXANDER, *et al.*, and
WILLIAM AND CHARMOND ADKINS, *et al.*,

Petitioners,

v.

UNITED STATES OF AMERICA, *et al.*,

Respondents

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS STATE OF WASHINGTON, 26 TIDELAND AND UPLAND PRIVATE PROPERTY OWNERS, PUGET SOUND SHELLFISH GROWERS, LARRY B. AND SHIRLEE ALEXANDER, AND WILLIAM AND CHARMOND ADKINS

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves to file the attached brief amicus curiae.[1] Consent to file this brief has been granted by counsel for the United States, the Jamestown, Lower Elwah and Port Gamble Bands of S'Klallams, Nisqually, Nooksack, Skokomish, Squaxin Island, Upper Skagit, Sauk-Suiattle, and Stillaguamish Tribes, the Suquamish Tribe, the Makah Tribe, the Quileute Tribe, Puget Sound Shellfish Growers, Petitioners Adkins, 26 Tideland and Upland Private Property Owners (UPOW), Petitioners Alexander, the Yakama Indian Nation, and the State of Washington. The letters of consent received have been lodged with the Clerk of this Court. Requests for consent to file the amicus curiae brief were made to the other parties, but as of the date of filing this brief written responses from them have not been received.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation has participated in numerous cases before the United States Supreme Court involving the protection of private property rights. PLF attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 117 S. Ct. 1659 (1997), and PLF participated as Amicus Curiae in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), *First English Evangelical*

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[1] Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for any party in this case authored this brief in whole or in part and, furthermore, that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to name but a few. PLF participated as Amicus Curiae in this case both in the proceedings before the district court, as well as on appeal in the Ninth Circuit, and also filed an amicus brief in this Court in connection with another case interpreting the treaties at issue here, *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, *modified sub nom.*, *United States v. State of Washington*, 444 U.S. 816 (1979).

Amicus seeks to augment Petitioners' arguments by arguing that this Court should decide the important question of whether the claims of the Tribes should be barred by the doctrine of laches, at least as to the right to take shellfish in private tidelands.[2] Not only do the equities weigh heavily in favor of thousands of private landowners, but previous decisions of this Court on laches do not address the unique circumstances of this case. Moreover, PLF is concerned that the Ninth Circuit's decision ignores the serious harm its decision will work on innocent property owners.

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[2] Both the Puget Sound Shellfish Growers and the Alexander/Adkins Petitioners have raised the issue of the application of laches in their petitions. *Puget Sound Shellfish Growers v. United States*, No. 98-1028, Petition at i; *Larry B. and Shirlee Alexander and William and Charmond Adkins v. United States*, No. 98-1052, Petition at 27.

For the foregoing reasons, PLF requests this Court to grant its motion to file the attached amicus curiae brief.

DATED: March, 1999.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE

The interest of Amicus Curiae Pacific Legal Foundation (PLF) is set forth in the preceding motion.

INTRODUCTION

In this case, the Ninth Circuit has determined that a number of Indian tribes in Western Washington (Tribes) have extensive rights to cross privately owned uplands and to enter and harvest shellfish from privately-owned tidelands. The Ninth Circuit determined the Tribes reserved these rights under a series of treaties entered into by the Tribes and the United States in 1854 and 1855 despite the Indian tribes having asserted no claim for 135 years that they possessed such rights, and despite a proviso in the treaties that the Indians would not have any right to take shellfish from "any beds staked or cultivated by citizens."

The decision of the Ninth Circuit substantially and adversely affects private property rights in the State of Washington. As noted by Judge Beezer in his concurrence, "[p]roperty rights, which have been undisturbed for generations, are encumbered by our decision today." *United States v. State of Washington*, 157 F.3d 630, 659 (9th Cir. 1998), Appendix (App.) at 46 (*Shellfish III*).

Despite the generations-long delay in making any claim, and despite the severe disruption of long-held property rights, the Ninth Circuit held that under this Court's precedents, the doctrine of laches could not be applied to bar any tribal claims. However, this Court has never held that the doctrine of laches is unavailable as a defense to the assertion of all Indian treaty claims. In fact, this Court expressly declined to address the question in *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) (*Oneida*), although a strong dissent by four Justices argued that the doctrine of laches should be available as a defense where an Indian tribe had waited 175 years before bringing suit to avoid a conveyance of tribal land for valuable consideration.

Whether the doctrine of laches should be applied to bar long unasserted Indian treaty claims, especially where those are claims of reserved rights to fish, hunt, or harvest, is a question of nationwide importance. In recent years, various tribes around the country have sought to reassert claims to usufructuary rights in public and private rights and private property. Indeed, a case involving reassertion of Indian hunting and fishing rights under an 1837 treaty between the United States and the Chippewa is presently pending before this Court.[1] The Courts should have the power to apply the doctrine in appropriate circumstances, especially where, as here, the Tribes failed to assert their claims for an extended period and the claimed rights severely disrupt long-held property rights. Accordingly, the Court should grant the petitions to answer the important question it left open in *Oneida*.

STATEMENT OF THE CASE

A. Summary of Proceedings Below

In 1970, the United States and the Tribes filed a complaint against the State of Washington seeking a declaratory judgment interpreting the Tribes' treaty rights to fish for salmon and steelhead. The district court retained continuing jurisdiction of future unresolved issues arising out of the fishing provisions of the treaties. *United States v. State of Washington*, 384 F. Supp. 312, 327-28 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086 (1976).

On May 19, 1989, 16 of the Tribes began the subproceeding now before this Court by filing a "Request for Determination re: Shellfish." The Tribes' claim arises out of provisions of five treaties (Treaties) negotiated with the United States in 1854 and

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[1] *State of Minnesota v. Mille Lacs Band of Chippewa Indians*, No. 97-1337; *County of Aitkin v. Mille Lacs Band of Chippewa Indians* No. 97-1356, and *Thompson v. Mille Lacs Band of Chippewa Indians*, No. 97-1357.

1855.[2] Each of the Treaties contains substantially similar language stating that the Indians would continue to possess

> [t]he right of taking fish, at all usual and accustomed grounds and stations . . . in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses on open and unclaimed lands: *Provided, however*, that they shall not take shell fish from any beds staked or cultivated by citizens.

Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, Art. III, App. at 170. On the basis of the language above, the Tribes claimed their fishing rights included a treaty right to harvest shellfish from all tidelands in Western Washington, including private and state owned tidelands, together with a right of access over upland properties to reach such tidelands. The district court initially determined that, under the Treaties, the Tribes were entitled to 50% of the shellfish harvest in Washington waters. *United States v. State of Washington*, 873 F. Supp. 1422 (W.D. Wash. 1994) (*Shellfish I*).

The district court then conducted an implementation trial. In its resulting decision, the court noted that

> [t]he Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and

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[2] Treaty of Medicine Creek, December 26, 1854, 10 Stat. 1132, App. at 169 ; Treaty of Point Elliott, January 22 1855, 12 Stat. 927, App. at 177; Treaty of Point No Point, January 26, 1855, 12 Stat. 933, App. at 187 ; Treaty with the Makah, January 31, 1855, 12 Stat. 939, App. at 195; and Treaty of Olympia, July 1, 1855, 12 Stat. 971, App. at 203. These treaties are also collectively referred to as the "Stevens Treaties," territorial Governor Isaac Stevens having negotiated the treaties on behalf of the United States.

> Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes. Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed.

United States v. State of Washington, 898 F. Supp. 1453, 1457 (W.D. Wash. 1995) (*Shellfish II*), App. at 97.

The decisions of the district court were appealed. Like the district court, the Ninth Circuit recognized that "the equities do weigh heavily in favor of the Growers' argument—the Tribes waited 135 years to assert their shellfishing rights." *United States v. State of Washington*, 157 F.3d at 649, App. at 28. Nevertheless, the Ninth Circuit rejected arguments that the equitable doctrine of laches should be applied to defeat the Tribes' claim to shellfish. The Ninth Circuit, while recognizing "the enormous impact our decision will have on the thousands of homeowners, Tribal members, and commercial fishermen in the Puget Sound region," 157 F.3d at 657, App. at 42, still held that the Tribes have Treaty rights to take 50% of shellfish on all Washington tidelands, including those in private ownership. *Id.* at 646-47, App. at 45-48.

On private tidelands, the Tribes are authorized to enter to conduct surveys of the claims and then may enter those private lands and take 50% of the clams and oysters, subject to "time, place and manner" restrictions. A limited exception is made for artificially cultivated beds. *Id.* at 653, App. at 38.

B. History of the Treaties and of the Shellfishing Industry in Washington

As noted by this Court in *State of Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658 (1979), the United States entered into the Treaties "[t]o extinguish the last group of conflicting claims to lands lying west of the Cascade Mountains and north of the Columbia

River in what is now the State of Washington." *Id.* at 661. As a result, "[t]he Indians relinquished their interest in most of the Territory in exchange for monetary payments." *Id.* at 662.

In return for the absolute conveyance of their aboriginal title to the United States, the Tribes received annual payments from the United States. Treaty of Medicine Creek, 10 Stat. 1132 App. at 169, Art. 4; App. at 171. The Indians also reserved certain rights including the right to hunt, fish, and gather as set forth above.

As demonstrated by the record below, Washington has had a long history of treating tidelands and their shellfish resources as private property, which was understood both by the Indians and by the white settlers. As noted in an earlier case interpreting the Treaties, the Indians traditionally recognized shellfish as property which could be exclusively possessed:

> The record establishes that the Indians recognized exclusive property interests in land and in sedentary resources. However, the Indians viewed migratory fish and animals differently from stationary ones. The right to take fish existed when, and only when, the fish were within or passing through a tribe's particular territory. . . . Indians considered shellfish, as sedentary creatures, to be the exclusive province of the tribe within whose territory they were located.

United States v. State of Washington, 506 F. Supp. 187, 199-200 (W.D. Wash. 1980), *aff'd in part, rev'd in part*, 694 F.2d 1374 (9th Cir. 1982), *on rehearing*, 759 F.2d 1353 (9th Cir. 1985), *cert. denied*, 474 U.S. 994 (1985). The Indians also understood the settlers' concept of private property as the right to exclude others from land and the resources on it. Exhibit D-064 at 345-46 (typescript of "Records of the Proceedings of the Commission to Hold Treaties with the Indian Tribes in Washington Territory and the Blackfoot Country," from December 7, 1854 - June 11, 1855, by E.G. Swindell, Jr. (Los Angeles, CA 1942)); Exhibit D-473 at 50-51 (Dr. Daniel

Boxberger, *The Ethnohistory of Western Washington Indians in the Nineteenth Century with Reference to Shellfish Use and Control* (May 1993)).

After ratification of the Treaties, various settlements including the Cities of Seattle, Tacoma, Bellingham, and Port Townsend grew on tidelands containing shellfish beds which had been used by local tribes. Exhibit D-470 at 19-28. In 1864, the territorial legislature granted commercial shellfish growers exclusive rights in natural oyster beds in southern Puget Sound. App. at 63 n.11; Transcript at 1936-37.

In 1879, the legislature gave citizens the right to claim up to ten acres of any newly discovered oyster beds. Session Laws of the Territory of Washington 118-20 (1879). Starting in 1889, the legislature authorized the sale of tidelands "for commerce, trade or business." Washington Laws 1895, ch. 178, §§ 54 and 62; Washington Laws 1889-90 at 431. And in 1891, the Washington Supreme Court recognized the state's "full power to dispose of [tidelands] subject to no restrictions save those imposed upon the legislature by the constitution." *Eisenbach v. Hatfield*, 2 Wash. 236, 245, 26 P. 539 (1891).

The Tribes understood that they permanently lost access to shellfish beds when settlers exercised their right to stake or cultivate such beds. Transcript at 431-34. Indeed, prior to this case, in the litigation involving the Tribe's right to take anadromous fish, the Tribes and their experts agreed that their rights to shellfish were subject to termination when staked or cultivated. One of the Tribes' expert witnesses, Dr. Barbara Lane, had testified that the Indians understood they could lose a "treasured shellfish bed" because settlers could stake or cultivate such beds "anywhere." *See* Puget Sound Shellfish Growers' Excerpt of Record (GER) at 17. And the Suquamish Tribe admitted in its brief to the Ninth Circuit that "[u]nlike the in common shellfish right, the in common salmon right is not defeasible by staking or cultivating." GER at 2.

In 1905, the federal Commissioner of Indian Affairs ruled that the Treaty of Point Elliott did not prevent the State of Washington from granting a lessee of its tidelands the right to exclude Indians from taking clams, even though "the clam beds in question have never been cultivated." App. at 212. In 1908, the Washington Supreme Court similarly ruled that these lessees could enjoin all persons including Indians from taking clams from the leased tidelands because the clams "live, not merely upon, but actually, within, the land [and] . . . in a very material sense, belong with the land." *Sequim Bay Canning Company v. Bugge*, 49 Wash. 127, 131, 94 P. 922 (1908).

Today, there are thousands of owners of uplands who also own the adjacent tidelands. There are approximately 150,000 private titles potentially affected by the Ninth Circuit's decision. Transcript of Proceedings, May 12, 1995, at 838, App. at 14.

The allocation of 50% of the harvest to the Tribes has a severe impact on private tideland property. A real estate appraiser with expertise in waterfront properties concluded that property values would be diminished by as much as 40% as a result. Transcript of Proceedings, Vol. 11, May 2, 1994, at 2158-66. Additionally, the allocation makes profitable shellfish harvest unfeasible for small shellfish growers. Transcript of Proceedings, May 12, 1995, at 848.

The decision potentially could also have a devastating impact on Washington's commercial shellfish industry in general. As noted by Judge Beezer in his concurrence:

> The burden imposed by our opinion cannot be overstated. The record in this case makes abundantly clear that since treaty times a vibrant shellfish industry has developed in the State of Washington along the saltwater beaches of the Pacific Ocean and along tidelands adjoining the inland waters of Puget Sound.
>
> . . .

> The tension between grower and Indian under treaty provisions is clear. One will not grow shellfish on lands bearing natural shellfish to provide subsistence to the other without compensation for the damage occurring to the cultivated shellfish.

Shellfish III, 157 F.3d at 658-59, App. at 44-45.

SUMMARY OF THE ARGUMENT

The Court should grant the petitions to address the undecided, but important question whether the doctrine of laches is applicable to bar long-unasserted Indian treaty rights to harvest shellfish from private tidelands. Thousands of innocent private property owners will suffer serious harm if the Tribes, after 135 years of inaction, are allowed to reassert shellfishing rights.

In holding that the doctrine of laches was unavailable to bar such claims, the Ninth Circuit relied upon its prior decision in *Swim v. Bergland*, 696 F.2d 712 (9th Cir. 1983), which in turn rested on this Court's decision in *Board of Commissioners of Jackson County v. United States*, 308 U.S. 343 (1939) (*County Commissioners*). *County Commissioners*, however, as well as other decisions of the Court holding that the doctrine of laches would not apply to bar Indian claims, can be readily distinguished from the situation here. Those decisions involved specific rights, immunities, or restrictions imposed by the United States upon tribes or tribal members, rather than reserved usufructuary rights.

Application of laches to such usufructuary rights is an important question raised by the decision below. Not only has it not been addressed by the Court, but it has significant nationwide importance, given the potential for reassertion of long-dormant usufructuary rights purportedly reserved in many other Indian treaties.

ARGUMENT

I

THE COURT SHOULD GRANT THE PETITIONS TO DECIDE FOR THE FIRST TIME THE IMPORTANT QUESTION OF WHETHER THE DOCTRINE OF LACHES IS APPLICABLE TO BAR OR LIMIT THE TRIBES' 135 YEAR DORMANT CLAIM TO TAKE SHELLFISH FROM PRIVATE TIDELANDS

This case raises an important question never before addressed by the Court. It is time to do so. In the past the Court has recognized that laches cannot apply where federal statute or treaty provisions specifically prohibit an action with regard to Indian lands, but this case raises a completely new question.

Nevertheless, the Ninth Circuit held that the doctrine of laches was not available to bar or limit the Tribes' claims in this case. While that court conceded that "the equities do weigh heavily in favor" of application of the doctrine because the Tribes waited 135 years to assert their shellfishing rights, the court did not consider application of the doctrine because its prior opinion in *Swim v. Bergland*, 696 F.2d at 718, had held that "[l]aches or estoppel is not available to defeat Indian treaty rights." *Shellfish III*, 157 F.3d at 649, App. at 28. The holding in *Swim* ostensibly rested on this Court's opinion in *Board of Commissioners of Jackson County v. United States*, 308 U.S. at 350-51.

An examination of *County Commissioners* demonstrates that this Court's holdings in that case are based on a very different situation of fact and law, one easily distinguishable from the present case. *County Commissioners*, as well as similar Supreme Court cases, all deal with the situation where specific rights, immunities, or restrictions have been *granted or imposed by the United States* upon tribes or tribal members. Thus in *County Commissioners*, what was at issue was a specific provision in the treaty with the Pottawatomies in which the United States provided that lands held in trust by the United

States for these Indians would be exempt from state taxation. 308 U.S. at 348. Thus, this Court could say with authority that "state notions of laches and state statutes of limitations have no applicability," and "the immunity of the sovereign from these defenses is historic. Unless expressly waived, it is implied in all federal enactments." *Id.* at 351.

The same analysis holds true in other opinions of this Court where the defense of laches was determined to be inapplicable. For example, in *Ewert v. Bluejacket*, 259 U.S. 129 (1922), the heirs of Charles Bluejacket, a full-blood Quapaw Indian, sought to have the courts void a deed by him to Paul Ewert. At the time of the challenged conveyance, Ewert was a special assistant to the Attorney General of the United States with the obligation to assist in the institution and prosecution of suits to set aside deeds to certain allotments in the Quapaw Indian Agency. *Id.* at 134. At the time of the conveyance a federal statute provided that

> [n]o person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States.

Id. at 135. This Court upheld the lower court's voiding of the deed because of the specific statutory prohibition and further held that the doctrine of laches was not applicable where there is a specific federal statutory prohibition on alienation of Indian title:

> [T]he equitable doctrine of laches, developed and designed to protect goodfaith transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions.

Id. at 138.

Similarly, in *Oneida* it was again Indian title which had been conveyed despite express federal statutory prohibitions. The

Oneida Indian Nation sought to recover damages for the use and occupation of 100,000 acres of its tribal lands which it had conveyed to the State of New York in 1795. The conveyance occurred despite the provisions of the federal Trade and Intercourse Act of 1793, which provided in pertinent part that

> no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution . . . [and] in the presence, and with the approbation of the commissioner or commissioners of the United States.

1 Stat. 330, § 8 (1793).

The Court stated that it would not consider application of the equitable doctrine of laches for two reasons. First, *Oneida* had been brought as an action at law for damages. Second, like *Ewert*, it involved questions of conveyance and extinguishment of Indian title in violation of specific federal statutory law. 470 U.S. at 244 n.16. Nevertheless, the four dissenting Justices in *Oneida* believed that where claims had been allowed to languish for 180 years, a federal common law concept of laches should be applicable to bar even claims of improper alienation of Indian title.

Unlike *Oneida*, the case before this Court has been maintained as an equitable action in which the Tribes have sought to enjoin the alleged interference with their reserved fishing rights under the Treaties. It also does not involve questions of improper alienation of Indian title, because that title was validly conveyed to the United States under the Treaties. Each one of the Treaties expressly provides that the Tribes shall

> *cede, relinquish, and convey to the United States, all their right, title, and interest in and to the lands and country occupied by them.*

Treaty of Medicine Creek, 10 Stat. 1132, App. at 169. Instead, this case involves the equitable interpretation and enforcement of the Tribes' reserved shellfishing rights. Thus, the situation is the paradigm of issue left open in *Oneida* and is in need of resolution by this Court.

In the present case, not only do we have a lapse of 135 years before the Tribes took any action to claim fishing rights in private shellfish lands, the interest they seek to vindicate is much more ephemeral than those previously at issue in the Court's jurisdiction.[3] Further, prior to this litigation the Tribes had never engaged in any action that would have put a reasonable person on notice of their claim. This Court has defined laches as follows:

> [T]he question of laches turns not simply upon the number of years which have elapsed between the accruing of . . .rights, whatever they were, and . . . assertion of them, but also upon the nature and evidence of those rights, the changes in value, and other circumstances occurring during that lapse of years. The cases are many in which this defense has been invoked and considered. It is true, that by reason of their differences of fact no one case becomes an exact precedent for another, yet a uniform principle pervades them all. They proceed on the assumption that the party to whom laches is imputed has knowledge of his rights, and an ample opportunity to establish them in the proper

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[3] In other words, in cases like *County Commissioners*, *Ewert*, and *Oneida*, the existence and extent of the right or prohibition can easily be determined by review of the applicable federal statutory provision. Here, as a practical matter, one can only be put on notice of the claimed right by actual and repeated exercise by the Tribes, which did not occur. Also, unlike Indian title, fishing and hunting rights on ceded land are not part of a Tribe's reserved sovereignty, but instead are lesser rights subject to regulation by the States. *Cf.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) at 335.

> forum; *that by reason of his delay the adverse party has good reason to believe that the alleged rights are worthless, or have been abandoned*; and that because of the changing condition or relations during this period of delay it would be an injustice to the latter to permit him now to assert them.

Galliher v. Cadwell, 145 U.S. 368, 371-72 (1892) (emphasis added).

Whether Indian rights have effectively been abandoned is an important question that this Court has considered in a number of its cases. In *Mitchel v. United States*, 34 U.S. (9 Pet). 711, 746 (1835), this Court stated:

> Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their rights to its exclusive enjoyment in their own way, and for their own purposes were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals. In either case their right became extinct.

Similarly, in *Williams v. City of Chicago*, 242 U.S. 434, 437 (1917), this Court stated:

> If in any view [the Pottawatomie Nation] ever held possession of the property here in question, we know historically that this was abandoned long ago and that for more than a half century [the tribe] has not even pretended to occupy either the shores or waters of Lake Michigan within the confines of Illinois.

This Court has also engaged in a similar analysis when previously construing fishing rights under the Stevens Treaties. In *Washington v. Washington State Commercial Passenger Fishing Vessel Association*, 443 U.S. 658, the Court noted that a Tribe's right to an allocation of anadromous fish could be

reduced if "it should find other sources of support that lead it to abandon its fisheries." *Id.* at 687. And in *Seufert Brothers Company v. United States*, 249 U.S. 194 (1919), this Court emphasized the fact that the tribe had continuously asserted a right of access to a traditional fishing area. There, the United States sought to restrain interference with Yakima Nation tribal members' rights to fish in a specific locality on the Oregon bank of the Columbia River, and the right to get access to this area through private property. This Court noted that "[d]uring all the years since the treaty was signed [the Indians] have been accustomed habitually to resort for fishing to the [Oregon side of the river]." *Id.* at 198. In upholding the lower court's ruling for the Indians, this Court stressed that the only "servitude" that existed was where there had been a "habitual" and "open and notorious" use of the property by the Indians:

> The suggestion, so impressively urged, that this construction "imposes a servitude upon the Oregon soil," is not alarming from the point of view of the public, and private owners not only had notice of these Indian customary rights by the reservation of them in the treaty, *but the "servitude" is one existing only where there was an habitual and customary use of the premises, which must have been so open and notorious during a considerable portion of each year that any person, not negligently or wilfully blind to the conditions of the property he was purchasing, must have known of them.*

Id. at 199 (emphasis added).

Like *Seufert*, the Ninth Circuit's decision here has effectively created a servitude on privately owned land but, unlike this Court in *Seufert*, the Ninth Circuit failed to adequately address the history of use which would indicate whether the rights had been abandoned by the Tribes, much less whether there had been the "habitual," "customary," and "open and notorious" use since treaty time required by *Seufert*. As a result, a floating easement, uncertain in extent and nature, now exists on tens of

thousands of acres of private property, a servitude that no private landowner could have known existed prior to the lower courts' rulings.[4]

Additionally, the Tribes took no action for 135 years to assert a claim to these rights, despite longstanding knowledge that both federal and state officials, as well as the state courts, had declared that no such rights existed. The Tribes' delay is further compounded by the fact that they may well have had a remedy at law for compensation from the United States, either under the Indian Claims Commission Act (ICCA), 25 U.S.C. § 70 for claims arising up to 1946 or under 28 U.S.C. § 1505 for post-1946 claims.[5] For example, many of the actions complained of by the Tribes actually were implemented by acts of the territorial legislature permitting private claims and ownership of natural shellfish beds. In 1905, the federal Commission of Indian Affairs declared that the State of Washington had the right to exclude Indians from taking clams from tidelands. The ICCA applies to all treaty claims including fishing and hunting rights. *See Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1464-67 (10th Cir. 1987).

PLF submits that given the long inaction of the Tribes which signaled abandonment of any rights, the reasonable reliance of thousands of private property owners who have purchased, occupied, and used tidelands for generations, and the serious

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[4] Also *cf.* Solicitor General Hoyt's statement in *United States v. Winans*, 198 U.S. 371 (1905), that "[w]e are not seeking to impress a broad and vague servitude on all patented lands along the Columbia, but only a clear and limited one on this particular small tract." 198 U.S. at 373.

[5] The United States Court of Federal Claims shall have jurisdiction of any claims "against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians . . . whenever such claim is one arising under the Constitution, laws or treaties of the United States or Executive orders of the President." 28 U.S.C. § 1505.

damage that will be done to private property rights, this case presents the appropriate situation for this Court to address whether the doctrine of laches should be applied.

II

THE COURT SHOULD GRANT THE PETITIONS BECAUSE APPLICATION OF LACHES IS ESPECIALLY PERTINENT WHERE THE TRIBES' PAST AND PRESENT DECISIONS NOT TO ASSERT THEIR CLAIMS AGAINST THE UNITED STATES NOW WORK UNFAIRLY TO SHIFT LIABILITY FOR SUCH CLAIMS FROM THE UNITED STATES TO INNOCENT PRIVATE LAND OWNERS

This case raises a serious question that should be addressed by this Court. Should laches apply to tribal claims that seek a remedy not against culpable governmental entities, but instead against innocent private property owners? In this case, both the district court and the Ninth Circuit recognized that thousands of private property owners are the innocent parties who will suffer the brunt of the impact of the courts' decision. The district court specifically found that

> Shellfish Growers and Private Property Owners are, effectively, innocent purchasers who had no notice of the Tribes' Treaty fishing right when they acquired their property. Indeed, many of these Growers and Owners purchased their land at or before the turn of the century, and they reasonably believed the land to be free of encumbrances and servitudes.

Shellfish II, 898 F. Supp. at 1457. The reasonable belief of private property owners was reinforced by the Tribes' long-standing failure to take any action to assert a claim to shellfish on this land: "Their belief was reinforced by the Tribes' failure to formally assert the Treaty right until over 100 years after the Stevens Treaties were signed." *Id.* The district court found that fault, if any, for creation of the situation lay with the State of Washington and the United States, not with private owners:

"Fault for creating this controversy lies squarely with the State of Washington and the United States, for selling the tidelands and not objecting to the sale, respectively." *Id.* at 1459.

Nevertheless, the United States appears in this action as a Plaintiff, ostensibly acting on behalf of the Tribes. The United States has taken this position despite the fact that it also possesses tidelands suitable for shellfishing,[6] and despite the fact the district court determined that it, and not private landowners, was in part responsible for any violation of the Tribes' treaty shellfishing rights. *Shellfish II*, 898 F. Supp. at 1459. Moreover, the United States only supported the Tribes' claim once it was clarified that the Tribes were not including federal tidelands.[7]

Alignment of the United States as a Plaintiff, rather than as a Defendant, raises important issues relevant to the laches question. As noted above, the Tribes possessed the right to assert claims for monetary compensation against the United States under the ICCA, as well as under 28 U.S.C. § 1505. The selective decision by the Tribes not to assert claims against the United States obviated the need for the United States to raise an obvious federal defense to the assertion of such claims: that the Tribes' remedy is not a suit for specific enforcement but, rather, an action for compensation either before the Indian Claims

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[6] PLF notes that if shellfishing claims are barred as to private lands, that does not necessarily mean that all shellfishing rights under the Treaties cease. At the present time, 53% of the tidelands are privately owned and 47% are either present reservation lands or public lands within the control of either the State of Washington or the United States. Exhibit US-181.

[7] As noted in the petition of 26 Tideland and Upland Private Property Owners (UPOW), the Tribes initially asserted their claim against all private and public tidelands. Later, after the United States supported the Tribes' claim, the Tribes clarified that they were not including federal tideland ownership within their claim. UPOW petition at 5-6.

Commission under the ICCA or a suit in the Court of Federal Claims under 28 U.S.C. § 1505.

Second, the decision by the Tribes not to assert claims against the United States and the United States' corresponding support of the Tribes in this action served to shift the burden to private landowners to "compensate" the Tribes for any wrongdoing of the United States. In other words, not only has the question of federal monetary compensation been avoided, under the lower courts' decisions, the potential obligation of the United States to make all of its own tidelands available for tribal shellfishing has now been transferred to, and is borne instead by, private landowners as well as the State of Washington.

The resulting situation is much akin to the "off-budget" transfers questioned by Justice Scalia in *Pennell v. City of San Jose*, 485 U.S. 1, 22 (1988). In that case, Justice Scalia noted there would be little public support if a measure requiring landlords to subsidize "hardship tenants" were instead structured to provide monetary subsidies to those tenants from public funds. The unfairness is even more evident here. It is impossible to conceive that Congress through legislation could dictate the result the United States and the Tribes have achieved indirectly here: requiring private shoreline owners to open their lands and make their shellfish resources available to the Tribes in order to preserve the federal government's own tideland property from those same treaty obligations. Such a direct measure also would pose serious constitutional questions since it would be an obvious example of "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The question of whether to apply laches is especially pertinent under these circumstances. Accordingly, the Court should grant the petitions.

III

WHETHER LACHES IS AVAILABLE TO BAR LONG-UNASSERTED TRIBAL USUFRUCTUARY RIGHTS IS A QUESTION OF NATIONWIDE IMPORTANCE

While they vary as to their specific provisions, many Indian treaties provide that the Indians reserve certain hunting and fishing rights in lands ceded to the United States. *See, e.g.*, F. Cohen, HANDBOOK OF FEDERAL INDIAN LAW (1942) at 285 n.171 (listing such treaties entered into between 1789 and 1864). In many cases these rights have not been exercised, especially where such lands were subsequently acquired and utilized by settlers and have been treated as private property for generations. The loss of property rights suffered by innocent Puget Sound property owners as a result of a retroactive treaty interpretation by the courts below creates a precedent that could be used to cause similar suffering by property owners in many other parts of the country as well.

The Court has long recognized that claims, especially those affecting property rights, should be asserted within a reasonable time. "The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles." *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 472 (1831). While "it is well established that treaties should be construed liberally in favor of the Indians," *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943), this should not work to reward those who have slept on their treaty rights.

A question of nationwide importance has accordingly been raised by the petitions. The question is whether laches is available to bar long-unasserted tribal usufructuary rights that if upheld will cause innocent landowners to lose significant private property rights. The Court should grant the petitions and address this question.

CONCLUSION

For the foregoing reasons, this Court should grant the petitions to consider the laches issue left open in *Oneida*. The need for such consideration here is great. The damage that will be done to private property rights if the Ninth Circuit's decision is allowed to stand will be tremendous. Rights which thousands of property owners for generations believed in good faith they possessed will be nullified, including the right to exclude others traditionally held by this Court to be "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Teleprompter Manhattan CATV Corporation*, 458 U.S. 419, 433 (1982).

DATED: March, 1999.

Respectfully submitted,

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